OPENING STATEMENT

SUBCOMMITTEE ON LEGISLATION

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

HONORABLE LOUIS STOKES

APRIL 1, 1987

IN A MEMORANDUM DATED DECEMBER 17, 1986, THE OFFICE OF LEGAL COUNSEL AT THE DEPARTMENT OF JUSTICE, STATED, REFERRING TO COVERT ARMS SALES TO IRAN, THAT "THE PRESIDENT WAS WITHIN HIS AUTHORITY IN MAINTAINING THE SECRECY OF THIS SENSITIVE DIPLOMATIC INITIATIVE FROM CONGRESS UNTIL SUCH TIME AS HE

BELIEVED THAT DISCLOSURE TO CONGRESS WOULD NOT INTERFERE WITH THE SUCCESS OF THE OPERATION." THE BASIS FOR THIS CONCLUSION IS THAT THE PRESIDENT HAS "WIDE DISCRETION" UNDER THE INTELLIGENCE OVERSIGHT ACT TO CHOOSE A "REASONABLE MOMENT" FOR NOTIFYING CONGRESS.

THIS DISCRETION, ACCORDING TO THE MEMO, IS "ROOTED AT LEAST AS FIRMLY IN THE PRESIDENT'S CONSTITUTIONAL AUTHORITY AND DUTIES AS IN THE TERMS OF ANY STATUTE." THE CONSTITUTIONAL BASIS IS ARTICLE II, SECTION 1 OF THE CONSTITUTION "THE EXECUTIVE POWER SHALL BE VESTED IN A PRESIDENT OF THE UNITED STATES OF AMERICA." BUT, AS THE MEMO ITSELF STATES, THE PRESIDENT'S AUTHORITY UNDER THIS CLAUSE IS "SUBJECT ONLY TO

LIMITS SPECIFICALLY SET FORTH IN THE CONSTITUTION ITSELF AND TO SUCH STATUTORY LIMITATIONS AS THE CONSTITUTION PERMITS CONGRESS TO IMPOSE BY EXERCISING ONE OF ITS ENUMERATED POWERS."

THERE IS NO QUARREL BETWEEN MEMBERS OF THE COMMITTEE AND THE PRESIDENT ON WHO HAS THE EXECUTIVE AUTHORITY IN THIS GOVERNMENT OR WHO MUST CONDUCT THE FOREIGN AFFAIRS OF THE UNITED STATES. THAT IS THE PRESIDENT'S RESPONSIBILITY AND HE DOES HAVE WIDE DISCRETION IN CONDUCTING THAT ACTIVITY. HOWEVER, CONGRESS ALSO HAS WIDE POWERS. IT ALONE MAKES THE LAWS OF THE UNITED STATES. IT ALONE APPROPRIATES MONEY AND MAY REQUIRE AN ACCOUNTING OF THE SAME. CLEARLY INHERENT IN THE POWER TO MAKE LAWS IS THE NEED TO OBTAIN INFORMATION NECESSARY

TO ENSURE THEIR PROPER EXECUTION. THUS, WHEN CONGRESS LEGISLATES TO REQUIRE INFORMATION AND TIES THIS REQUIREMENT TO THE APPROPRIATION OF FUNDS, IT ALSO STANDS ON FIRM CONSTITUTIONAL GROUND.

THE TROUBLE, OF COURSE, IS THAT THE CONSTITUTION DOES NOT CLEARLY DELINEATE WHERE THE AUTHORITY OF ONE BRANCH OF GOVERNMENT ENDS AND THE OTHER BEGINS. INDEED, IT APPEARS THAT THE FOUNDING FATHERS FULLY INTENDED THAT CONFLICTS OF AUTHORITY BE RESOLVED PRINCIPALLY BY THE COUNTERBALANCING OF ONE BRANCH AGAINST ANOTHER. AND, THE THIRD BRANCH OF GOVERNMENT, THE JUDICIARY, HAS BEEN RELUCTANT TO SETTLE DISPUTES BETWEEN THE

EXECUTIVE AND LEGISLATIVE BRANCH IN AREAS WHERE THEIR INTERESTS AND AUTHORITIES CONTEND ONE WITH THE OTHER.

IN THE CASE OF THE CONDUCT OF COVERT ACTION OPERATIONS BY THE EXECUTIVE BRANCH WHICH HAVE BEEN APPROVED BY THE PRESIDENT, THE ADMINISTRATION CLAIMS SOME SORT OF A CONSTITUTIONAL PRIVILEGE ON THE PART OF THE PRESIDENT TO WITHHOLD NOTICE. THAT IS NOT A NEW CLAIM. IT WAS MADE DURING THE CARTER ADMINISTRATION AS WELL. HOWEVER, IT IS CLEAR FROM THE DEPARTMENT'S MEMORANDUM THAT THIS ADMINISTRATION RELIED AS MUCH ON THE LANGUAGE OF THE INTELLIGENCE OVERSIGHT ACT AS IT DID ON CONSTITUTIONAL AUTHORITY TO WITHHOLD NOTICE OF COVERT ARMS SALES TO IRAN. THE DEPARTMENT TELLS US IN VERY CLEAR LANGUAGE

THAT THE PHRASE "IN A TIMELY MANNER" IS VAGUE AND SUBJECT TO LIBERAL INTERPRETATION BY THE PRESIDENT. UNDER THOSE CIRCUMSTANCES, IT SEEMS CLEAR THAT IF CONGRESS INTENDED THAT PHRASE TO MEAN SOMETHING MORE SPECIFIC, OR IF IT INTENDS THAT IT SHOULD IN THE FUTURE, IT BEHOOVES US TO MODIFY THE STATUTE.

I BELIEVE THAT THE CONGRESS THOUGHT IT WAS WRITING INTO THE STATUTE AN EXCEPTION TO THE PRIOR NOTIFICATION RULE ONLY IN CASES WHERE TIME WAS OF THE ESSENCE. WE DIDN'T SAY THAT SPECIFICALLY IN AN EXCESS OF CAUTION. THAT CAUTION HAS BETRAYED US AND MAY WELL IN THE FUTURE. WE SHOULD RETURN TO THE UNDERSTANDING THAT SEEMS TO HAVE EXISTED IN 1980, NAMELY,

THAT PRIOR NOTICE SHOULD BE WITHHELD ONLY IN CASES WHERE THE PRESIDENT IS UNABLE - BECAUSE OF THE PRESS OF EVENTS - TO NOTIFY CONGRESS BEFORE COVERT ACTION BEGINS.

THAT IS THE PRINCIPAL PURPOSE FOR WHICH H.R. 1013 WAS INTRODUCED, TO RESTATE IN CLEAR TERMS THE REQUIREMENT FOR PRIOR NOTIFICATION, EXCEPT IN CASES WHERE TIME IS OF THE ESSENCE. THE BILL LEAVES IN PLACE THOSE PROVISIONS IN THE ACT WHICH PERMIT NOTIFICATION TO A SMALLER GROUP THAN THE TWO INTELLIGENCE COMMITTEES IN CASES WHERE EXTREME SENSITIVITY SUGGEST TO THE PRESIDENT THAT KNOWLEDGE OF A PARTICULAR COVERT ACTION SHOULD BE SEVERELY RESTRICTED.

FINALLY, THE BILL REQUIRES THAT A SIGNED COPY OF EVERY PRESIDENTIAL FINDING BE PROVIDED TO THE INTELLIGENCE COMMITTEES TO ENSURE THAT, AS DID NOT HAPPEN DURING THE IRAN AFFAIR, CONGRESS KNOWS EXACTLY WHAT THE PRESIDENT DID APPROVE AND WHEN HE APPROVED IT.

I BELIEVE THAT H.R. 1013 IS FIRMLY GROUNDED IN CONSTITUTIONAL AUTHORITY. I THINK THAT AS LONG AS CONGRESS LEGISLATES IN SUCH A MANNER AS TO REASONABLY AND RESPONSIBLY OBTAIN THE INFORMATION IT NEEDS TO PERFORM ITS DUTIES, WHILE AT THE SAME TIME LEAVING THE PRESIDENT TO MAKE THE DECISIONS AND RETAIN FLEXIBILITY TO CONDUCT COVERT OPERATIONS AS HE DIRECTS, WE CAN HAVE THAT CONFIDENCE.

I REMIND BOTH OUR WITNESSES AND THOSE WHO ARE PRESENT HERE TODAY THAT THE SENSITIVITY OF ANY PARTICULAR PIECE OF INFORMATION - BECAUSE THAT IS ALL CONGRESS IS REQUIRING, THE PROVISION OF INFORMATION - THE SENSITIVITY OF THAT INFORMATION OFFERS NO REASONABLE GROUNDS FOR WITHHOLDING THAT INFORMATION FROM CONGRESS. THE EXECUTIVE BRANCH OUGHT TO SHARE SUCH INFORMATION WITH A CO-EQUAL BRANCH OF GOVERNMENT, THE LEGISLATURE. THE TERMS OF THAT SHARING MUST BE REASONABLE AND INCLUDE APPROPRIATE SECURITY ARRANGEMENTS, BUT SECURITY ISSUES ARE INSUFFICIENT GROUNDS FOR A PRESIDENT TO DENY INFORMATION TO CONGRESS WHEN THE PROCEDURES FOR RECEIVING THAT INFORMATION ARE SET FORTH IN THE STATUTE SIGNED BY THE PRESIDENT. IT IS SIMPLY INAPPROPRIATE FOR EXECUTIVE BRANCH OFFICIALS TO ARGUE THAT

CONGRESS SHOULD NOT BE TRUSTED WITH INFORMATION. THEIR OWN TRACK RECORD AT KEEPING SECRETS SHOWS THAT THIS IS AN UNBALANCED VIEW AND ONE UNFOUNDED IN REALITY.